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The European Court of Justice Taking Rights Seriously?

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THE EUROPEAN COURT OF JUSTICE

TAKING RIGHTS SERIOUSLY ?

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1. INTRODUCTION

It is a difficult thing to appear to be objecting to any extension of the legal protection of human rights. Human rights are generally thought of as a "good thing" which courts should be seen to be safeguarding.

In this paper we shall review some recent decisions by and opinions delivered to the European Court of Justice in which the vocabulary of human or fundamental rights has been used. We confine ourselves to an analysis of texts produced by or delivered to the Court rather than attempt a survey of the academic literature on the topic of human rights protection because our interest is in the way the European Court has used, perhaps indeed manipulated, the vocabulary of human rights. We wish to provoke a debate. We question the easy assumption that the use of human rights rhetoric by the European Court of Justice means that the European Court is idealistically extending the protection of human rights.

Whilst it would appear to be widely accepted [1] that the initial motivation for the adoption of human rights rhetoric by the European Court of Justice was a desire to defend the Court's position on the supremacy of Community law over national law, close analysis of certain recent case law of the European Court shows that the Court has begun to use human rights language in a different way.

Human rights are now being used by the Court not, as previously, as a shield to protect long-standing claims about the status of Community law, but rather as a sword with which to extend its jurisdiction into areas previously reserved to Member States' Courts and to expand, incrementally, the influence of the Community over the activities of the Member States. We call this the "offensive" use of human rights, which is to be contrasted with the earlier "defensive" use.

It will be argued that the Court is using human rights "offensively" in two ways. On the one hand, it is extending the use of the concepts of human rights in specific areas of Community law previously untouched by those concepts. On the other hand, it is undertaking a more general expansion of its jurisdiction, in the guise of human rights protection, into areas previously the preserve of Member States, by means of subtle changes in its formulation of a crucial jurisdictional rule.

With respect to both the offensive and defensive uses of human rights we would question whether the Court has ever been motivated by a concern for any supposed lack of adequate protection of human rights within the European Communities. We contend that the increasing use of human rights rhetoric by the European Court has not, in fact, been matched by any equivalent increase in the actual protection accorded to the individual. We suggest that the Court has ulterior motives for employing human rights discourse. We argue that the European Court has used human rights discourse primarily with a view to maintaining and extending the supremacy of European Community law. We conclude that the Court treats human rights instrumentally for its own ends, that is, with a view to accelerating the process of legal integration in the Community. It has not protected fundamental human rights for their own sake. It has not taken these rights seriously.

2. THE DEFENSIVE USE OF HUMAN RIGHTS

From the late nineteen sixties onwards there was increasing disquiet expressed by the Courts in Germany and Italy on the question of whether or not the fundamental rights entrenched in their national constitutions were recognised or protected within European Community law **[2]**. The fear was that the fundamental rights guaranteed in national law would

gradually be eroded as the competences of the Community increased.

In response to the threat that national Courts (notably those of Germany) would resolve their dilemma by opting for the supremacy of their own national constitutional provisions on fundamental rights protection (and hence take it upon themselves to measure the validity of European law measures against their own national constitutional requirements) the European Court appeared suddenly to discover that the protection of fundamental rights was a principle of European Community law. This development flew in the face of its own previous case law rejecting the idea of fundamental rights protected within the Community legal order **[3]**, and was effected notwithstanding the absence of any mention or list of fundamental rights within the texts of the Community treaties.

In a series of cases, primarily in response to references from German Courts, the European Court began to use the vocabulary of fundamental rights protection.

The European Court first proclaimed the new doctrine of fundamental rights protection in passing in **Stauder v. Ulm [4]**. Referring to a decision by the Commission to allow butter to be purchased at low cost by, inter alios, senior citizens on proof of their status, the Court stated that fundamental rights were "enshrined in the

general principles of Community law and protected by the Court". This reference to "fundamental rights" was expanded upon by the Court in **Internationale Handelsgesellschaft** [5] to the effect that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice." And in **Nold (II) v. Commission** [6] the Court held that, in addition to Member States' constitutions, international Conventions could also supply guide-lines which could be taken into consideration by the Court on matters concerning claims to "fundamental rights".

Subsequent case law [7] has indicated that these international Conventions taken into account by the Court include the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Social Charter and a number of conventions of the International Labour Organisation.

It is the European Convention on Human Rights, which has been ratified by all the Member States of the Community, which has become the most important of these international documents in terms of being a source text for the Court in developing the idea of fundamental rights. The European Convention on Human Rights was first specifically referred to by the Court in the 1975 case of **Rutili** [8] and has since been quoted by the Court on numerous occasions [9]. From these references it would appear that the Court has determined that the

unwritten Community law which, it claims, justifies protection of fundamental rights includes principles which are identical to the terms of the European Convention.

The European Convention on the Protection of Human Rights and Fundamental Freedoms was expressly mentioned in the 1987 preamble to the Single European Act **[10]** as one of the sources of the fundamental rights recognised by the Community. This reference was quickly interpreted by the Court as a tacit approval by the Member States of the European Court's adoption of the terms of the Convention **[11]**. Formal recognition in a Treaty article of the status of the European Convention as a source of fundamental rights to be protected by the Community was given in article F(2) of the Common Provisions of the Treaty on European Political Union agreed upon at the Maastricht Summit of December 1991. This article states the following:

> "The [European] Union shall respect fundamental rights as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States as general principles of Community Law".

It is by now beyond question that the early use of human rights discourse seen from **Stauder** onward was primarily defensive of the matter of the supremacy of Community law. As Professor Joseph Weiler has stated, on a number of occasions, **[12]** :

> "The surface language of the Court in **Stauder** and its progeny is the language of human rights. The deep structure all about supremacy ... [It was] an attempt to protect the concept of supremacy threatened because of the apparent (largely theoretical) inadequate protection of human rights in the original treaty systems."

Subsequent case law has shown that this particular strategy to defend the supremacy of Community law and of the European Court has been a largely successful one, despite initial caution on the part of the German Courts. In its judgement of 4 April 1987 in **Wuensche Handelsgesellschaft** **[13]** the German Federal Constitutional Court stated

> "[S]o long as the European Communities, and in particular in the case of the European Court, generally insure an effective protection of fundamental rights as against the sovereign power of the Communities which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the [German] Constitution, and insofar as they generally safeguard the

> essential content of fundamental rights, the Federal Constitutional Court will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation ... and it will no longer review such legislation by the standard of the fundamental rights contained in the [German] Constitution."

The German acceptance of the human rights credentials of the European Communities is, in other words, conditional on the European Court's protection of human rights being maintained to as high a standard as that of the German Courts.

It should also be noted that, in its judgement number 232 of 21 April 1989, the Italian Constitutional Court re-affirmed the principle, first set out by that Court in 1973 in **Frontini v. Ministero delle Finanze [14]**, that the Italian Constitutional Court retains a residuary power to declare a Community norm invalid if the Community norm in question appears to be contrary to fundamental principles of the Italian constitutional legal order or to compromise inalienable human rights. The Italian Constitutional Court thereby maintains its own competence to ensure that the essential values of its national legal order are protected vis a vis Community norms and, in effect, to review judgements of the Court of Justice on this matter. **[15]**

However, both the German and Italian reservations on the matter of human rights are, and are likely to remain, theoretical. Neither Court has refused to apply Community laws on the basis of their violation of fundamental rights. Professor Schermers analyses the reservations as being no more than a general assertion of the existence of a higher normative order of peremptory norms in international law which ensures that even the E.C. treaty cannot legally be applied in a way which violates fundamental human rights. **[16]**

It is interesting to note that the text of article F(2) of the Common Provisions of the Maastricht Treaty does not answer the reservations expressed by both the Italian and German courts on the matter of the protection of inalienable human rights. The article simply takes up the formula created by the jurisprudence of the European Court to the effect that fundamental rights will be treated in the same way as if they were general principles of Community law. The article does not commit the European Union to treating human rights as some higher normative standard against whioch Community law is to be measured.

In summary, we may justifiably conclude that the European Court's policy on human rights appears, thus far, to have averted any fundamental damage by the Courts of Member

States to the integrity, unity and supremacy of the Community legal order.

3. THE OFFENSIVE USE OF HUMAN RIGHTS

In an address delivered to the Centre for European Studies at Harvard University in November 1989 Judge Mancini of the European Court summarised and assessed the position which had by then been achieved by the Court on human rights:

> "Reading an unwritten bill of rights into Community law is indeed the most striking contribution the Court made to the development of a constitution for Europe. This statement should be qualified in two respects. First ... that contribution was forced on t he Court form outside, by the German and, later, the Italian Constitutional Courts. Second, the Court's effort to safeguard the fundamental rights of the Community citizens stopped at the threshold of national legislations." **[17]**

Recent case law has shown that this assessment has to be modified however to reflect a change in the strategy of the European Court in relation to human rights rhetoric: from being a defensive tool in relation to the supremacy issue, it now appears to have been turned to offensive uses. Human rights discourse has been used in cases

which broaden the scope and impact of Community Law at the expense of Member State law, in areas where previously Member States had thought themselves to possess an independent discretion.

3.1 Specific Expansion of the Use of Human Rights

As Judge Mancini indicates in the above passage one feature of what we have characterised as the defensive use of human rights developed by the European Court was that the concept of human rights was applied only to Community acts. Initially, at least, human rights were not applied directly to the activities of Member States **[18]**.

More recent case law seems to suggest that the Court no longer feels itself constrained to observe any distinction between Community acts and Member State acts, at least in relation to human rights. The Court has increasingly been applying human rights considerations to the acts of Member States.

One case decided in 1975 appeared to lay the foundations for this later development: **Rutili** **[19]**. The facts of the case were as follows: the French Ministry of the Interior sought to restrict the movements of an Italian national within France, derogating from Article 48 of the E.C. Treaty on the free movement of workers. The grounds stated for such derogation were those set out in article

48(3) namely "public policy, public security and public health". The European Court examined the question as to whether or not this public policy derogation from the Treaty was justifiable under Community law. The Court held that the scope of the public policy derogations could not be determined unilaterally by Member States, but was a matter to be determined by Community institutions.

The Court held that any such national derogations from Community law had to be interpreted strictly in the light of Community law generally. Among the relevant provisions of Community law was a Directive 64/221 on Special Measures Concerning the Free Movement of Foreign Workers and Regulations 1612/68 on Trade Union Membership. This directive and the regulations placed limits on the capacity of Member States to derogate from the principle of the free movement of workers on grounds of public policy. The French derogation on public policy grounds was accordingly assessed in the light of these limitations.

However, the Court went on to suggest that these limitations on Member State action under positive Community law were also parallelled by certain provisions of the European Convention on Human Rights **[20]**.

> "[T]hese limitations ... are a specific manifestation of the more general principle enshrined in Articles 8, 9, 10 and 11 of the

> Convention for the Protection of Human Rights and Fundamental Freedoms ... which provides[s], in identical terms that no restrictions in the interests of national security or public safety shall be placed on the rights secured by the above quoted articles other than such as are necessary for the protection of those interests 'in a democratic society'".

The Court alluded to human rights considerations in the context of Member State action. It did not, however, apply them directly, or indeed hold them applicable, to that Member State action . The allusion to human rights is made simply to justify and reinforce the Court's interpretation of the Community instruments.

As Advocate-General Trabucchi stated in his opinion **Watson and Belmann [21]**, a case decided in the year after **Rutili**:

> "[S]ome learned writers have felt justified in concluding that the provisions of the [European] Convention must be treated as forming an integral part of the Community legal order, whereas it seems clear to me that the spirit of the judgement [in **Rutili**] did not involve any substantive reference to the provisions [of the European Convention] themselves but merely a reference to the general principles of which, like the Community

rules with which the judgement drew an analogy, they are a specific expression."

In the Advocate-General's opinion, the novelty of **Rutili**'s reference to human rights lay rather in the context in which that reference was made, namely in relation to a discretionary act of a Member State which restricted a Community economic freedom.

In **Watson v. Belmann** itself there was argument to the effect that human rights consideration were relevant to considering the validity of certain Italian regulations relating to the compulsory registration of foreign nationals staying in Italy. Advocate-General Trabucchi asserted **[22]** that the European Court might look at the alleged infringement of a fundamental right by a Member State body at least to the extent to which that infringement impacted also on economic rights protected by Community law. The Court, however, did not take up the human rights points and decided the case on other grounds.

It is not until 1989 that the Court is seen openly to take the step of assessing the validity of an act of a Member State on the basis of human rights considerations. In **Wachauf v. Federal Republic of Germany** **[23]** the plaintiff was the lessee of a farm which, during the period of his lease, he had developed as a dairy farm to the extent that he was able to obtain a milk production

quota. These quotas are attached to the land until surrender of the quota. According to the German authorities, the relationship of the quota to the land was such that when the plaintiff's lease expired, he was unable to surrender his quota and claim compensation without the consent of the lessor, the owner of the land. This consent was withheld and Herr Wachauf was faced with the situation of being deprived, without compensation, of the fruits of his labour.

It was posited, inter alia, that such an eventuality would be incompatible with the requirements of the protection of fundamental rights, (although this phrase appears nowhere except in the judgement of the Court), being potentially an "unconstitutional expropriation without compensation" **[24]**.

The Court held **[25]**

> "[I]t must be observed that Community rules which, upon the expiry of the lease, had the effect of depriving the lessee, without compensation, of the fruits of his labour and of his investments in the tenanted holding would be incompatible with the requirements of the protection of fundamental rights in the Community legal order. **Since those requirements are also binding on the Member States when they implement Community rules, the Member States must, as far as possible, apply**

those rules in accordance with those requirements."

Nevertheless, in that case, the pleas with respect to fundamental rights did not cause the Court to hold the Community legislation to be invalid. As in **Stauder** the Court held **[26]** that the regulation in question was expressed in broad enough terms as to allow for compensation to be granted to the aggrieved tenant farmer, thereby allowing his fundamental rights to be respected.

However, the decision in **Wachauf** breaks new ground because, for the first time, the European Court was willing to apply human rights principles to national acts formulated in implementation of Community legislation. The Court held that where a Community provision incorporates the protection of a human right national measures which implement that provision must give effect to the provision in such a way that the human right is respected.

This decision, in effect, rendered the original determination of the German authorities invalid on human rights grounds. The German authorities were instructed to look again at the primary Community legislation in the light of human rights considerations and make their decision accordingly.

This may indeed be a conservative interpretation of the implications of **Wachauf**. The European Court itself, in the subsequent case of **Elleniki Radiophonia Tileorasi v. Dimotiki Etairia Pliroforissis** [27], interpreted **Wachauf** in much broader terms. The Court restated its decision in **Wachauf** in these terms [28]:

> "[M]easures which are incompatible with respect for human rights, which are recognised and guaranteed [in Community law], could not be admitted in the Community."

It is not clear from the terms of the judgement in **Elleniki** whether the Court in this passage is referring to Community measures or Member State measures, but given that **Elleniki** concerned measures instituted by Greece, a Member State, in derogation from Community law, the latter conclusion is not unjustifiable.

Further, in **Elleniki** the Court adopted a more aggressive human rights approach to the question of the admissibility of public policy derogations by Member States from Community law than is evidenced by **Rutili**. **Elleniki** concerned a challenge by an independent broadcasting company in Greece to the enforcement of a State monopoly on the provision of television services within Greece. Greek law forbade any party other than the State Television Company to broadcast television programmes within Greek territory. The defendant company defied this ban and when prosecuted, pleaded in

their defence that the television monopoly was contrary both to Community law (inter alia, on the free movement of goods and services) and to Article 10 of the European Convention on freedom of expression and information. The Greek Government defended the television monopoly as a public policy derogation from the free movement of goods and services under Article 66. The Court held **[29]** that:

> "When a Member State invokes articles 56 and 66 of the Treaty in order to justify rules which hinder the free movement of services, this justification, which is provided for in Community law, must be interpreted in the light of general principles of law, notably fundamental rights. The national rules in question may only benefit from the article 56 and 66 exceptions insofar as they are compatible with fundamental rights, the observance of which the Court ensures."

The Court went on **[30]** :

> "The limitations imposed on the power of Member States to apply the provisions of articles 66 and 56 of the treaty for reasons of public order, public security and public health must be understood in the light of the general principle of freedom of expression, enshrined in Article 10 of the European Convention."

In **Elleniki**, the European Court is once more seen to be extending its jurisdiction in the matter of human rights. The Court is, in effect, applying the text of the European Convention not only to the acts of Community institutions but also to any attempts by Member States to derogate from the market freedoms assured by Community law. It is a development of **Rutili** precisely in that it uses the European Convention on Human Rights as an additional standard on the basis of which to judge Member State action, rather than, as in **Rutili**, merely a declaration which happens to echo general principles of existing Community law.

Joseph Weiler, writing before the **Elleniki** decision **[31]** suggests that the following statement of principle could be derived from the judgement in **Rutili**:

> "If the Community law is but a specific manifestation of a general principle it should follow that the general principle forms part of the Community regime which controls the practices of the Member States under the derogation. It further follows, that a national practice which violated this general principle **without violation a specific rule of the Community regime**, would violate Community law and, by virtue

of the principle of supremacy, be inapplicable."

We would argue that Weiler goes too far in drawing this conclusion from **Rutili**, but would accept this formulation as an accurate statement of Community law following **Elleniki**.

Most recently, **The Society for the Protection of Unborn Children Ireland Ltd v. Stephen Grogan and others [32]** represents the encroachment by Community Law on one of the fundamental precepts of the Irish Constitution, raising the possibility that the Irish guarantee of the right to life of the unborn child, and the consequent prohibition on abortion in the Irish Republic might be held to be incompatible with fundamental objectives of the Community. This case will be discussed in full below. It is sufficient to note at this stage that the jurisdictional expansion in this instance was not achieved through upholding the pre-eminence of individual human rights. Rather, the Court treated the claim to human rights as concerning a restriction on the Community freedom to provide and receive services. In so doing the Court effectively ignored the clear wording of the Irish Constitution which explicitly extends human rights protection to the unborn.

3.2 Changing formulations of Jurisdictional Rules

The line of cases from **Wachauf** through to **S.P.U.C.** also evinces an incremental expansion of the area of law and of Member State action which is subject to human rights validation by the European Court of Justice.

In **Cinéthèque and others v. Fédération nationale des cinémas français** [33] the Court stated

> "Although it is true that it is the duty of this Court to ensure observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, **an area which falls within the jurisdiction of the national legislator**."

Judge Pescatore, commenting on the **Cinéthèque** decision, wrote as follows: [34]

> "This position shows that the Court is conscious of the limits of its jurisdiction: called upon to guarantee respect for the law within the Community it has no mission to busy itself with the defence of human rights within the sphere

of the legislative sovereignty of Member States."

Nevertheless, the **Cinéthèque** formula was reworded in **Demirel v. Stadt Schwaebisch Gmund** [35]

"[the Court] has no power to examine the compatibility with the European Convention on Human Rights of national legislation lying outside the scope of Community law".

This change of emphasis from that which is within the jurisdiction of the national legislator to that which is within the jurisdiction of Community law is a subtle one, but one which may nevertheless have revolutionised the impact of human rights considerations on national administrative and legislative action. For one thing it paved the way for the decision in **Wachauf**. As has been outlined above, this case applied human rights standards to a Member State act in implementation of a Community rule. Such an act is one which clearly falls within the jurisdiction of the national legislator and also falls within the scope of Community law. The application of human rights criteria in this case would not have been consistent with the reasoning of **Cinéthèque** but fell within the **Demirel** formulation.

In **Elleniki**, the Court appeared to go further, stating the following [36]:

> "According to its jurisprudence ... [see the decisions in **Cinéthèque** and **Demirel**] the Court cannot assess, from the point of view of the European Convention on Human Rights national legislation which is not situated within the body of Community law. By contrast, **as soon as any such legislation enters the field of application of Community law**, the Court, as the sole arbiter in this matter, must provide the national Court with all the elements of interpretation which are necessary in order to enable it to assess the compatibility of that legislation with the fundamental rights - as laid down in particular in the European Convention on Human Rights - the observance of which the Court ensures."

The implication of the Court is that it would examine all matters which did fall within the area of Community law. The only Member State actions which the Court might decline to vet on human rights grounds are, therefore, those which occur in an area of exclusive Member State jurisdiction. This concept of exclusive Member State jurisdiction may itself be open to future redefinition by the Court.

This implication was made explicit by Advocate General Van Gerven in **S.P.U.C. v. Grogan** when he stated **[37]**:

> "In **[Cinéthèque]** ... it was stated that the Court's power of review did not extend to "an area which falls within the jurisdiction of the national legislator", a statement which, generally speaking, is true. Yet once a national rule is involved which has effects in an area covered by Community law (in this case Article 59 of the EEC Treaty) and which, in order to be permissible, must be able to be justified under Community law with the help of concepts or principles of Community law, then the appraisal of that national rule no longer falls within the **exclusive jurisdiction** of the national legislature."

The Court in **S.P.U.C. v. Grogan** did not expressly adopt the Advocate-General's formulation, asserting **[38]** that it was competent to pronounce on human rights issues "where national legislation falls within the field of application of Community law" but that "the Court has no such jurisdiction with regard to national legislation lying outside the scope of Community law." Nevertheless, the implication as to the requirement of exclusive national jurisdiction remains.

In summary, the Court's power of review arguably now extends to any Member State action in an area where the Member State does not have exclusive jurisdiction. In practice, this would be a major expansion of the **Cinéthèque** reasoning, and a doctrine of much wider application than the strict terms of the decision in **Wachauf**.

4. IS THE EUROPEAN COURT TAKING RIGHTS SERIOUSLY ?

The adoption of the discourse of human rights seemed to commit the European Court to the principle that certain Community rules of law should be measured by the standard of their respect for human rights. If the rules in question failed to respect particular fundamental rights then this would of itself be a ground for declaring them invalid. A question then arises as to the competence of the European Court to subject even primary articles of the Treaty which created it to scrutiny on human rights grounds. As Manfred Dauses states **[39]** in reference to human rights

> "Strong arguments point to the conclusion that elemental legal principles which are based on the ultimate concept of law itself and which therefore constitute the fundamental pillars of any society take precedence even over the Community treaties; it would appear to be

> inconsistent with their nature as an ethico-juridical guarantee of a fundamental, prepositive and supra-positive type if positive law of whatever type were to be given priority. In fact in relation to international law that is precisely the conclusion which has been expressed in the Vienna Convention on the Law of Treaties Articles 53 and 64 of which declare that any treaty is void if it conflicts with a peremptory norm of general international law (ius cogens)."

Dauses would appear to be arguing that human rights are at the peak of the normative hierarchy of laws against which all rules of positive Community law, even Treaty provisions, may be measured and if found wanting, declared invalid.

This is, in essence, the basis of the European Court's claim to national Courts that it could be relied upon to protect fundamental rights, which was implicit in the Court's original adoption of human rights discourse. National Courts would only accept the supremacy of European law if they were persuaded that the European Court was truly a guardian of the rights of the individual against the possible abuse of legal forms by the institutions of the Community. Legitimate action by Community institutions was to be limited by the higher

standard of respect for fundamental human rights. As the Court stated in **Hauer v. Land Rheinland-Pfalz [40]**

> "[M]easures which are incompatible with the fundamental rights recognised by the Constitutions of [the Member] States are unacceptable in the Community."

However, in the above cases and indeed in most if not all of the cases in which the Court has adopted human rights discourse it is the Community rule, or the Community objective which has prevailed, on the facts, over the violation of human rights arguments. A recent survey of human rights protection in the European Community admitted **[41]**:

> "[A]lthough the Court has increasingly referred to the [European] Convention, the European Social Charter, international treaties and constitutional principles and traditions, the rights contained therein have hardly been developed by the Court, and they have rarely been relied on to give concrete protection to an individual."

It is our contention that these common outcomes are not coincidental, but, as evidenced in particular in the recent cases discussed above, they follow directly from an instrumental manipulation of the nature and importance of the concept of human rights protection, and of its relationship to the four

fundamental economic freedoms enshrined in the Treaty of Rome, and other Community objectives such as the Common Agricultural Policy.

In each case the Court has manipulated the usage of human rights principles, endowing the principles with just enough significance in Community terms to allow the triumph of the Community will, be that in terms of the actual concrete outcome of the case or merely in terms of obiter expansions of claimed Community competence, laid down to be taken up and expanded upon in future cases.

4.1. Wachauf - human rights as an interpretative principle

In **Wachauf**, for example, human rights, far from being regarded as a universal and overarching principle of validation, were treated as no more than a principle of interpretation which Member States should adopt when applying Community legislation. Firstly, the Court firmly placed its regard for fundamental rights in a position effectively subordinate to its regard for the common (Community) good. It stated that **[42]** :

> "The fundamental rights recognized by the Court are not absolute, however, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in

> particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference impairing the very substance of those rights."

In effect then, a fundamental right may only be recognised and protected insofar as it is consistent with Community objectives. Even the outer limit of human rights abuse, the provision that the very substance of the right must not be impaired, is itself to be delineated according to the (Community) aim pursued.

The Court in **Wachauf** goes on to state, as we have noted above:

> "[S]ince...(the requirements of the protection of fundamental rights) ... are also binding on the Member States when they implement Community rules, the Member States must, **as far as possible**, apply those rules in accordance with those requirements." **[43]**

Not only may the Community rules discount human rights in the name of common objectives, but the Member States, in applying those Community rules, need have regard to human rights concepts only as a principle of interpretation,

and only to the extent that this is compatible with the wording of the legislation. To summarise, where Community actions, in pursuit of Community objectives, are concerned, human rights claims are quite clearly not accorded fundamental status.

4.2. **Elleniki - human rights used to validate national action**

A different approach from **Wachauf** is apparent in relation to purely Member States' actions which are not in implementation of Community law. The issue arises clearly when a Member State seeks to invoke its rights under the Treaties to derogate from a provision relating to the Community economic freedoms. In **Elleniki** in which, as we have seen, the Greek Government sought to derogate from the general Community freedom to provide and receive services, the Court held that such derogations must not only be compatible with the general administrative principles of Community law (for example proportionality) but should also conform to the general standards of human rights which the Court claims to respect and protect.

Human rights are seen to reclaim their position at the peak of the normative hierarchy, and Member State actions, specifically those actions which detract from fundamental Community economic freedoms, must be subject to them. The Court's apparent reassertion of the pre-

eminent position of human rights would seem to be in conflict with the approach of the Court in **Wachauf**, where human rights appeared to be treated as subordinate to Community objectives. The Court itself does not appear to see any contradiction between the decisions in **Wachauf** and **Elleniki** since it quotes the former case in support of its argument in the latter. How then are **Wachauf** and **Elleniki** to be reconciled? One may note immediately that whereas in **Wachauf** the Court was examining the validity of a Community provision, in **Elleniki** the matter at issue was a provision of national legislation. There would appear then to be two standards in operation - one standard for Community acts, another standard for Member States' acts. In the former, human rights are subordinate to and have to be interpreted in the light of Community objectives. In the latter, human rights are presented as an additional hurdle which national States' acts have to negotiate in order to be accepted as valid. **[44]**

4.3. S.P.U.C. - human rights avoided

In 1983 following upon a referendum in the Irish Republic, an amendment (the eighth) was made to the Irish Constitution. The following subsection, article 40(3)(iii), was introduced into it:

> "[T]he State acknowledges the right to life of the unborn and with due regard to the equal right to life of the mother, guarantees in its

laws to respect and, as far as practicable by its laws to defend and vindicate that right."

In 1989 a case was brought by the Society for the Protection of the Unborn Child against the office bearers of various Students Unions in Ireland seeking an injunction to prevent the students from distributing various publications which contained, inter alia, information about clinics which performed legal abortions in Great Britain **[45]**. The case was referred to the European Court of Justice for a preliminary judgement under article 177 of the EEC Treaty.

The law, at the time of this reference was unclear as to whether or not the European Court would recognise and protect fundamental rights proclaimed in the constitution of only one Member State, or was willing to extend this protection only where the right was protected in some, a majority, or indeed all of the Member States. In 1976 in **I.R.C.A.** **[46]** Advocate-General Warner had stated that, in his opinion that "a fundamental right recognised and protected by the Constitution of any Member State must be recognised and protected in Community law."

On the basis of this opinion, one commentator, writing as recently as 1988 **[47]** stated that:

"[I]t is probable that the European Court would accept as a general principle of Community law a principle which is constitutionally protected

> in only one Member State. In other words, any measure which is contrary to human rights in Germany or any other Member State will be annulled by the European Court."

Such a view gains plausibility given the history of the European Court's relations with the German Courts on this matter and in the light of the thesis of the European Court's adoption of human rights protection as a defence of the supremacy of Community law.

The Irish Constitution's recognition and protection of the right to life of the unborn appears to be a clear case of a fundamental right which is protected in only one Member State of the Community. However, in **S.P.U.C. v. Grogan** neither the Advocate-General nor the Court followed the "maximalist" approach of **I.R.C.A.** on Community protection of human rights. In his opinion Advocate-General Van Gerven described the point at issue in the case in the following terms **[48]**:

> "[T]wo rules which stem from fundamental rights come into conflict in this case: the freedom of the defendants in the main proceedings to distribute information, which I have accepted as being the corollary of the Community freedom to provide services vested in the actual providers of the service ... and the prohibition to assist pregnant women, by providing information which, according to the

Irish Supreme Court, results from the constitutional protection of unborn life."

The Irish Constitution's grant of a "fundamental right" to life is, in effect, placed by the Advocate-General at precisely the same level as the right freely to provide services throughout the Community. Protection of the former right demands a restriction on the distribution of information; while the stimulation of free trade appears to require freedom of information.

In its judgement **[49]** the European Court approaches the matter as if the Irish Constitution's proclamation of "the right to life of the unborn" were to be understood as nothing more than a restriction on abortion. The Court only uses the phrase "right to life of the unborn" in quoting the relevant provision of the Irish Constitution. Thereafter it glosses over arguments to the effect that abortion could not be granted the status of a service to be protected under Community law as it constituted an attack on fundamental rights guaranteed to the unborn in the Irish Constitution.

As Walsh J. of the Irish Supreme Court and former judge of the European Court of Human Rights had stated **[50]** in the Supreme Court in the appeal by S.P.U.C. against the refusal of the judge at first instance to grant an injunction against the students:

"Although the provision of abortion within the law in particular Member States provides profit for those engaged in it, that could scarcely qualify it to be described as a service of economic significance of a type which must be available in all the Member States of the Communities especially when it is manifestly contrary not only to the public morality of the Member State in question and to the ordre public but also destructive of the most fundamental of all human rights, namely the right to life itself. The fact that particular activities, even grossly immoral ones, may be permitted to a greater or lesser extent in some Member-States does not mean that they are to be considered within the objectives of the treaties of the European Communities, particularly the Treaty of Rome , which is the Treaty of the European Economic Community. A fortiori, it cannot be one of the objectives of the European Communities that a Member State should be obliged to permit activities which are clearly designed to set at naught the constitutional guarantees for the protection within the State of a fundamental human right."

The European Court characterised these arguments, which surely go to the heart of the question of whether

abortion ought to be protected as a service under Community law, as moral rather than legal, and hence arguments which did not raise justiciable issues. It stated **[51]**:

> "It is not for the Court to substitute its assessment for that of the legislature in those Member States where the activities in question are practised legally."

This refusal to look at the morality of Member States action sits uneasily with the previous jurisprudence of the Court, for example in **Elleniki**, that they were willing to examine national legislation for its compatibility with fundamental rights.

Having translated the Irish fundamental right into what it regarded as suitably legal terms, namely as a restriction on the availability of abortion, the European Court then defined abortion or termination of pregnancy as "a medical activity which is normally provided for remuneration may be carried out as part of a professional activity" **[52]**. Accordingly abortion constituted "a service within the meaning of Article 60 of the treaty." **[53]**. Article 59 of the Treaty prohibits any restriction by Member States on the freedom to supply services throughout the Community. However, the European Court held that the injunction which was sought against the students did not constitute a breach of article 59 because the link between the students'

associations and the British abortion clinics was a "tenuous" one. The Court's formal finding on the matter is stated thus **[54]** :

> "[I]t is not contrary to Community law for a Member State in which medical terminations of pregnancy is forbidden to prohibit students associations from distributing about the identity and location of clinics in another Member State where voluntary termination of pregnancy is lawfully carried out and the means of communicating with those clinics, where the clinics in question have no involvement in the distribution of the said information."

The terms of the judgement of the Court deciding against the students are surprisingly narrow. The judgement leaves open the possibility of some formal agency relationship being set up between the British abortion clinics and activists in Ireland. This would allow the latter, as associates of an economic operator established in another Member State, to receive the full protection of European law regarding freedom to provide and receive services as against the specific provisions of the Irish constitution.

It seems likely that this issue will therefore re-appear before the European Court of Justice, once the student associations have made formal agreements with the English abortion clinics. In that event, the Court having

already found that abortion is a service within the meaning of the Treaty, may seek to adopt the reasoning of Advocate-General Van Gerven to the effect that, whilst abortion is a service and thus entitled to protection under the Treaty, the Irish Government may derogate from the Treaty provisions:

> "[T]hey are entitled to invoke the ground of public policy referred to in Article 56 read together with Article 66 (and also in Article 36) of the EEC Treaty..., in other words, according to the definition which has been adopted by the Court, 'a genuine and sufficiently serious threat to the requirements of public policy affecting one of the fundamental interests of society' ". **[55]**

He then goes on to examine this derogation in the light of fundamental rights and freedoms, as is now required by **Elleniki**. In the light of the importance of the objective of the restriction on freedom of expression, as perceived by the Irish authorities, that is, "to effectuate the value judgement contained in the Constitution with regard to the need to protect unborn life" **[56]**, the Advocate-General concluded that the restriction was acceptable.

Before **Elleniki** it may well have been possible to claim a public policy derogation from the Treaty provisions, but now that such derogations are also subject to human

rights validation the Irish Government may find itself in a corner should the European Court of Human Rights find that its constitutional amendment is contrary to the European Convention. The possibility of challenge to the very substance of the eighth amendment cannot therefore be ruled out.

The European Court's interpretation of the Irish provision on abortion has the effect of extending that Court's jurisdiction into the very heart of the Irish constitution. Henceforth, the onus is on the Irish authorities to justify in Community law their ex facie interference with Community "fundamental rights". **[57]**

4.4. Heylens - the elevation of Community Rights to the status of fundamental human Rights

Another technique used by the Court in relation to fundamental human rights has been a confusion of terminology which has resulted in the elevation of the free market freedoms guaranteed in the Community treaties to a status equivalent to that of fundamental human rights. In such cases as **A.D.B.H.U.** **[58]** and **Heylens** **[59]**, Community economic freedoms were grouped together with and referred to as "fundamental rights", hence destroying any possibility of the maintenance in practice of the hierarchy whereby the provisions of the treaty

might be measured against human rights considerations. This appeared to have been the approach formerly espoused by the Court and is one which is borne out by the traditional international law conception of human rights as "higher law" as expressed by Dauses **[60]**.

As a result, inter alia, of this confusion in terminology it is no longer clear that Community acts, in pursuit of Community objectives such as the four economic freedoms, fall to be considered against the overarching standard of human rights protection.

In **A.D.B.H.U**,. **[61]** it was stated that

> "[I]t should be borne in mind that the principles of free movement of goods and freedom of competition, together with freedom of trade as a fundamental right, are general principles of Community law of which the Court ensures observance."

The Community economic freedom, the free movement of goods was placed on the same conceptual level as a "fundamental right". But, the Court was to go further.

In **Heylens** **[62]** it was stated

> **"Since free access to employment is a fundamental right which the treaty confers individually on each worker of the Community,** the existence of a remedy of a judicial nature

against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual effective protection for his right."

From the terms of the **Heylens** decision it appears that the four freedoms of workers, services, goods and capital enshrined in the Treaties are themselves capable of being translated into individuals' fundamental rights. It would seem, then, that there is no distinction and hence no hierarchical relationship being posited by the European Court between the basic human rights outlined, for example, in the European Convention on Human Rights and the free market rights specifically provided for in the written Treaties of the Community. The claims of individuals to be able to benefit from the free movement of workers, services, goods and capital appear to be put on the same level as the grander claims of basic human rights such as the right to life, to respect, to freedom from torture, or to due judicial process.

If there is no distinction to be drawn between basic human rights and market rights then it is difficult to see any justification in the claim that the European Court will measure the specific enactments of Community law against some pre-eminent standard of respect for and protection of human rights. The invocation of the idea of human rights by the European Court does not set fundamental limits on lawful executive action, because

executive action which has as its object the promotion of the four market freedoms is itself, in the vocabulary of the European Court, instantiating a fundamental right. A claim to violation of certain fundamental human rights hence ceases to be a "trump card" against executive action.

If human rights such as the right to property, to freedom of expression, et cetera, are placed on the same conceptual level as the economic freedoms, the freedom of movement of workers, goods, services and capital, we can no longer speak of a "validation" of a lower norm by a higher norm. What we have instead is the balancing against each other of two norms of equal qualitative significance. Such a procedure can be seen in the opinion of the Advocate General in **S.P.U.C. v. Grogan** where he balances freedom of information, seen **[63]** as a corollary of the Community freedom to provide services against, ultimately, the right to life of the unborn child. The result of this equality in practical terms can only be that the Court will find it conceptually and logically easier to subordinate a fundamental human right to a Community economic freedom, as did Advocate-General Van Gerven in **S.P.U.C v. Grogan**.

Such a slippage from Community economic freedoms to fundamental human rights is, at best, contentious. It implies a positive stance on an issue which remains controversial in international law, namely, the

relationship between different categories of rights. For example, how are classic civil and political rights set out in the European Convention on Human Rights to be compared to claims to various economic, social and cultural rights set out in such documents as the European Social Charter and, it would now seem, the Treaty of Rome. The notion that, for example, the free movement of capital is a fundamental right in the international Community and not just in the European Community is by no means generally accepted. **[64]**

4.5. Taking Rights Seriously - a summary

There is no consistency in the normative significance accorded by the European Court of Justice to fundamental human rights. As seen in the contrast between **Wachauf** and **Elleniki**, there is a selective standard applied according to whether the legal rule at issue has its provenance in a Community institution, or rather was promulgated by a Member State.

Further, **S.P.U.C. v. Grogan** demonstrates that, on occasion, the Court will effectively ignore fundamental rights issues and adopt a less than maximalist approach to rights protection where a Community economic freedom is at stake. The case is a clear repudiation of the views of Advocate General Warner in **I.R.C.A.**. **S.P.U.C. v. Grogan** indicates that recognition of a fundamental

right in one Member State is insufficient to ensure its recognition and protection within the Community legal order.

Further, the case law we have cited indicates the tendency of the Court to confuse the question of the standing of fundamental rights in its normative hierarchy by designing Community freedoms as fundamental rights. Such an elevation can only be detrimental to the normative significance which has, hitherto, been accorded to fundamental human rights.

By using the term "fundamental right" in an instrumental way the Court refuses to take the discourse of fundamental rights seriously. It thereby both devalues the notion of fundamental right and brings its own standing into disrepute.

5. CONCLUSION

The tactics and techniques of the European Court in using and applying human rights should now be clear from the line of cases we have examined. It would appear that the European Court initially adopted the terminology of fundamental rights in order to quell the revolt in the German Courts on the question of the adequate protection of human rights. It has thereby preserved the emergent doctrine of supremacy of Community law. The cases of

Wachauf, **Elleniki** and **S.P.U.C. v. Grogan**, illustrate the subsequent use of fundamental rights as a convenient procedural device for expanding the jurisdiction of the Court into areas of specifically national competence. Further, the Court is also seeking to use human rights principles, as expressed primarily in the European Convention on Human Rights, as another level of review (and effective invalidation) of Member States' action, even where that action cannot be said to contravene the specific provisions of the E.C. Treaties. The Court has effectively declared in these cases that all questions concerning Community law have to be interpreted in the light of human rights considerations, as seen specifically in the text of the European Convention on Human Rights.

These developments, consequent upon a plainly instrumental approach to human rights concepts, have considerable practical implications for all the Member States of the Community, not least for the United Kingdom which has not yet unequivocally adopted the European Convention on Human Rights into its domestic law.

Given the jurisdictional expansion seen in the reformulation of the **Cinéthèque** dictum in **Elleniki** and **S.P.U.C.**, the Court now sees itself as being able to review national legislation wherever this operates in an area touched by Community law. The **Elleniki** case holds that such assessment of the validity of national law will

be made from a point of view of its respect for human rights. Similarly national Courts would now seem to be obliged to give effect to the European Convention on Human Rights as this would be interpreted by the European Court of Justice, if not the European Court of Human Rights in Strasbourg, in all questions before them which fall within the field of Community law. **[65]** Article F(2) of the Common Provisions of the Maastricht Treaty may encourage this trend.

In adopting and adapting the slogan of protection of human rights the Court has seized the moral high ground. It is difficult for national Courts to be seen to be objecting to their own duty to protect and enforce individual human rights.

Further, there would seem to be no reason to prevent the Court of Justice also assessing national legislation on the basis of other general principles of Community law, such as the doctrine of proportionality. The Court has consistently stated that "fundamental rights form an integral part of the general principles of law, the observance of which it ensures." **[66]** In this way, it would seem that where human rights have ventured, other general principles will follow and new, Community, doctrines of administrative law will thereby be imposed on the United Kingdom courts ande administration.

In **R. v. Secretary of State for the Home Department, ex parte Brind and others** [67] the House of Lords examined the validity of the British Government's ban on the broadcasting of the voices of members of certain organisations notably Sinn Fein. Arguments were presented to the effect that the use of executive power in this regard was disproportionate to its proclaimed objective. These arguments were given short shrift.

Lord Lowry stated [68] that:

> "[T]here is **no** authority for saying that proportionality in the sense in which the appellants have used it is part of English common law and a great deal of authority the other way. This, so far as I am concerned, is not a cause for regret..."

It is clear, following **Wachauf** (which was not cited to the Court), that had the Secretary of State's decision in **Brind** been taken in implementation of Community legislation the House of Lords would have been obliged to apply, inter alia, the doctrine of proportionality, as interpreted by the European Court of Justice would be held applicable even in the United Kingdom [69]. This has already occurred in the various cases which have arisen out of challenges to the English Sunday trading laws on the basis of their alleged incompatibility with Article 30 of the Treaty of Rome [70].

Further, the jurisdictional rule as formulated in **Elleniki** and **S.P.U.C.** would suggest that the general principles of E.C. law should be applied by national Courts not simply where national authorities act in implementation of a Community rule but in fact when they act in any field touched by Community law. And it is clear that the fields where Community law can be said to have no influence are few and becoming fewer. It will become increasingly difficult for the British Courts to resist the application within domestic law of, not just proportionality but also the whole range of principles of administrative justice developed in and applied by the European Court of Justice. **[71]**

These developments in Community law might have been welcomed wholeheartedly if they had truly been effected by the European Court with the goal of extending the legal protection of the individual. However, from the outset it has been clear that human rights have been used, not with a view to protecting the individual, but with a view, rather, to protecting the status of the Court and of the Community legal order **[72]**. In practice, the substance of individual rights is rarely, if ever, upheld as against Community objectives, whilst in theoretical terms their status has been devalued by the Court which treats human rights, and in particular their place in any normative hierarchy, in a confused and ambiguous way.

The Court seems willing to apply human rights as if they were superior to (and hence grounds for invalidating) the acts of Member States. However, at the same time, it clearly subordinates human rights to the end of closer economic integration in the Community. Evidently it is such integration, to be achieved through the acts of Community institutions, which the Court sees as its fundamental priority. The high rhetoric of human rights protection has become no more than a vehicle for the Court to achieve its own ends and to extend its own power and influence.

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FOOTNOTES:

[1]. see particularly Eric Stein: "Lawyers, Judges and the Making of a Transnational Constitution" (1981) American Journal of International Law 1 at 14; Mendelson: "The Court of Justice and Human Rights" (1981) Year-book of European Law 125 at 148; Weiler: "Eurocracy and Mistrust" 61 Washington Law Review (1986) 1103ff.; Rasmussen: On Law and Policy in the European Court of Justice (1986), Amsterdam, pp. 393-405; Hartley: The Foundations of European Community Law (2nd edn. 1988) Oxford, 132; Collins: European Law in the United Kingdom (4th edn. 1990) London, 70-3; Weiler, Cassese and Clapham (eds.): Human Rights and the European Community 1991 (Nomos Verlag, Baden-Baden) Volume II, 580-1;

[2] for a summary of the relevant German case law see especially Brinkhorst and Schermers Judicial Remedies in

the European Community, 144-54. On the Italian views see Frontini v. Ministero delle Finanze [1974] 2 C.M.L.R. 372

[3] see Friedrich Stork & Co. v. High Authority of the E.C.S.C. (1/58) [1959] E.C.R. 17; Geitling v. High Authority of the E.C.S.C. (36-8,40 /59); Sgarlata v. Commission of E.C. (40/64) [1965] E.C.R. 215)

[4] (29/69) [1969] E.C.R. 419, at 425

[5] (11/70) [1970] E.C.R. 1125, 1134

[6] (4/73) [1974] E.C.R. 491, 507

[7] see in particular the cases cited in Toth "Human Rights" Encyclopaedia of European Community Law 1990 Oxford at 284

[8] 36/75 [1975] E.C.R. 1219

[9] see for example Hauer v. Land Rheinland-Pfalz (44/79) [1979] E.C.R. 3727; National Panasonic v. Commission (136/79) [1980] E.C.R. 1979; Johnson v. R.U.C. (222/84); [1986] E.C.R. 1651, Elleniki (260/89) (unreported judgement of 18 June 1991); S.P.U.C. v. Grogan (159/90) (unreported judgement of 4 October 1991)

[10] see The Treaties Establishing the European Communities, Luxembourg

[11] see Germany v. Commission (249/86) 18 May 1989 [1989] E.C.R.; also Edward/Lane An introduction to European Community Law 1991 Butterworths, Edinburgh at paragraph 95

[12] most recently in Weiler, Cassese and Clapham (eds.) op. cit. at Volume II 580-1. Weiler's interpretation is also supported by Cappelletti in The Judicial Process in Comparative Perspective Clarendon Press, (Oxford) 1989 at 394:

> "It seems to me correct to say, with Weiler and other commentators, that Nold II as well as Stauder and International Handelsgesellschaft were but the inevitable consequence of the judgements in Van Gend en Loos, Costa v. E.N.E.L. and their progeny: an attempt to safeguard the pre-eminence of Community law."

[13] [1987] 3 C.M.L.R. 225, at 265

[14] Case 183 of 27/12/73 reported in [1974] 2 C.M.L.R. 383-90

[15] See generally Gaja: "Re FRAGD" 27 Common Market Law Review (1990) 94; Antonio Saggio "Rapports entre droit

communautaire et droit constitutionnel italien" 1991 Rivista di Diritto Europeo 327 at 330.

[16] see Henry Schermers "The Scales in Balance: National Constitutional Court v. Court of Justice" 27 Common Market Law Review (1990) 97.

[17] G. Federico Mancini "A Constitution for Europe" 26 Common Market Law Review (1989) 595 at 611.

[18] see for example Defrenne v. Sabena 149/77, [1978] E.C.R. 1365, and Demirel (12/86) [1987] E.C.R. 3719.

[19] (36/75) [1975] E.C.R. 1219

[20] at paragraph 32

[21] 118/75, 1976 E.C.R 1185, at 1207

[22] at page 1208

[23] (5/88), [1989] E.C.R. 2609

[24] at 2614

[25] at 2639, paragraph 19. It is arguable that, in seeking to ensure that Member States implement Community legislation uniformly, or at least according to a uniform set of standards, Wachauf should be viewed as an

extension of the philosophy which has led to the conferral in certain circumstances of direct effect upon Community directives.

[26] at p. 2640, para. 22

[27] (260/89) (unreported judgement of 18 June 1991)

[28] at paragraph 41 **[Authors' translation]**. Compare the difference in this formulation to that used in Hauer (cited at note **[36]**)

[29] at paragraph 43 **[Authors' translation]**

[30] at paragraph 45 **[Authors' translation]**

[31] Joseph Weiler "The European Court at a Crossroads: Community Rights and Member State Action" in Liber Amicorum Pierre Pescatore (1987) at page 834

[32] (159/90) Judgement of 4 October 1991, not yet reported

[33] 60-1/84 (1985) E.C.R. 2605, at paragraph 26

[34] Pierre Pescatore "La Cour de Justice des Communautes Europeenes et la Convention europeene des Droits de l'Homme" in Protecting Human Rights: The

European Dimension, Cologne (1988) 441 at 446 [Authors' translation]

[35] (12/86) [1987] E.C.R. 3719 at 3754 paragraph 28.

[36] at paragraph 42 **[Authors' translation]**

[37] at page 31

[38] at page 11, paragraph 30

[39] in "The Protection of Fundamental Rights in the Community Legal Order" 1985 European Law Review 398 at 407

[40] (44/79) [1979] E.C.R 3727 at 3745 para. 15:

[41] See Clapham in Vol 1, Human Rights and the European Community, page 56. R v. Kirk 63/83 [1984] E.C.R. 2689 appears to be one case in which an individual has benefited directly from the application of human rights principles, specifically, the prohibition on retroactive penal legislation contained in Article 7 of the European Convention. See also Pinna v. Caisse D'Allocations Familiales de la Savoie [1986] E.C.R. 1, invalidating a Council regulation under the general principle of equal treatment under Article 48 of the E.C. Treaty.

[42] at 2639, paragraph 18

[43] at 2639, paragraph 19

[44] This allegation of a double standard would appear to be confirmed by R v. Kirk (63/83) [1984] E.C.R. 2689

[45] S.P.U.C. v. Grogan [1990] 1 C.M.L.R. 689

[46] (7/76) [1976] E.C.R. 1213, 1237

[47] Hartley op. cit. at 135

[48] unreported, delivered on 11 June 1991, at paragraph 25

[49] (159/90) unreported judgement of 4 October 1991

[50] S.P.U.C. v. Grogan (1990) 1 C.M.L.R. 689 at 704

[51] at paragraph 20

[52] at paragraph 18

[53] at paragraph 21

[54] at paragraph 31

[55] unreported, delivered on 11 June 1991, at page 24 citing Regina v. Bouchereau 30/77 (1977) E.C.R. 1999

[56] at page 41

[57] It is interesting to compare this shifting of the burden of proof from Community institutions to Member States in the field of legal integration with a similar development noted by Dehousse in the area of institutional integration, in "1992 and beyond: The Institutional Dimension of the Internal Market Programme", Legal Issues of European Integration [1989] 1 109

[58] Procureur de la République v. A.D.B.H.U. (240/83) (1985) E.C.R 520

[59] U.N.E.C.T.E.F v. Heylens (222/86) [1987] E.C.R. 4098

[60] op. cit.

[61] at 531

[62] at 4117, paragraph 14

[63] at paragraph 19

[64] See Koen Lennart, Judge of the European Court of First Instance "Fundamental Rights to be included in a Community Catalogue" [1991] European Law Review 367

[65] For a useful survey of the case law illustrating how the European Court of Justice and the European Court of Human Rights have diverged in the interpretation of public policy exceptions to the right of free movement see Stephen Hall "The European Convention on Human Rights and Public Policy Exceptions to the Free Movement of Workers under the E.E.C. Treaty" 1991 European Law Review 466.

[69] Nold (II), (4/73) [1974] E.C.R. 491 paragraph 13, page 506)

[67] [1991] 2 W.L.R. 588,

[68] at 609

[69] This conclusion would appear to be the confirmed by Klensch v, Secretaire d'Etat 201-2/85, 1986 E.C.R. 3477, where the general principle of equality was applied as a fundamental principle of Community law to acts of Member States in implementation of a common Community policy. See in particular page 3507-8, paragraphs 9, 10.

[70] See in particular Torfaen Borough Council v. B. & Q. plc 145-88 [1989] E.C.R. 3851; W.H. Smith Do-it-All

Ltd. and Payless D.I.Y. Ltd. v. Peterborough City Council [1990] 2 C.M.L.R. 577; Stoke-on-Trent City Council v. B. & Q plc [1991] 2 W.L.R. 42

[71] The end result of would seem to be the effective adoption by the Court of the general statement of policy advocated by Professor J. Weiler in "The European Court at a Crossroads": Community Human Rights and Member State Action" in Liber Amicorum P. Pescatore 1987, pp. 821-842 states at 830:

> "Neither the Community, nor its Court of Justice, should ever accept that within an area of positive Community policy, through Member State action, even if otherwise tolerated, the individual should be the subject of conduct which violates general principles of law and standards of human rights which are considered unacceptable within the E.C. legal order. A commitment to protecting fundamental human rights must mean that the moment an individual enters an area which is occupied by Community positive policy, even if the "occupation" is not total and Member States retain residual powers, the canopy of Community protection must be extended."

[72] It may be suggested that Adams v. Commission (145/83) [1985] E.C.R 3539 is one case in which the European Court vindicated the rights of the individual as

against the Community Institutions. The Court found the Commission liable for damages caused to Mr. Adams as a result of the Commission's failure to ensure that Adams' identity was kept confidential from his erstwhile employers, whom he had reported to the Commission for trading in a manner contrary to E.C. competition law. However, the case is quite unique in its facts and, in any event, was not decided on the basis of Mr. Adams' human or fundamental rights having been breached. Instead, the Court found that the servants of the Commission had a duty of confidentiality under article 214 of the E.C. Treaty, and that breach of this duty could competently found a claim for damages.

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